

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DANIEL ORME,

Plaintiff,

vs.

BURLINGTON COAT FACTORY OF OREGON,  
LLC; BURLINGTON COAT FACTORY OF  
WASHINGTON, LLC; and BURLINGTON  
COAT FACTORY WAREHOUSE OF PORTLAND,  
INC.,

Defendants.

Case No. CV07-859-HU

FINDINGS AND RECOMMENDATION

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HUBEL, Magistrate Judge:

Plaintiff Daniel Orme brings this action against his former  
employer, Burlington Coat Factory, and related entities  
(collectively, Burlington), asserting claims for retaliation under

1 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, 42  
2 U.S.C. § 2000e-3(a), and Or. Rev. Stat. § 659A.030. Burlington  
3 moves for summary judgment.

#### 4 **Facts**

5 Mr. Orme was employed by Burlington from March 3, 2006 to  
6 April 20, 2006 at its Jantzen Beach store, as a customer service  
7 representative in the linens department (Linens). Complaint ¶ 3;  
8 Declaration of Jennifer Nelson, Exhibit 1, Orme deposition (Orme  
9 dep.) 13:3-6; 13:11-13; 13:16-20. Dana Bennett was the district  
10 manager who oversaw the operations of the store and Jim Kidd was  
11 the store manager. Id. at 14:12-16, 14:09-11. Cecil Cornette  
12 managed the cashiers and the "front end" of the store and acted as  
13 assistant store manager. Id. at 14:16-24; 17:22-23.

14 Mr. Orme's primary job responsibilities were to assist  
15 customers and clean up after them. Id. at 25:03-15. The process of  
16 returning merchandise or other store items to their proper places  
17 is called "recovery." Id. at 26:15-28:03. During the time that Mr.  
18 Orme worked for Burlington, Linens lacked a manager. Id. at 16:17-  
19 18, 16:23. Dorothy Jacobson was the manager of the women's  
20 department, which was located next to Linens. Id. at 32:3-10. It  
21 was not uncommon for her to walk past Linens. Id. at 40:6-7.

22 On April 14, 2006, Mr. Orme worked in Linens until closing  
23 time. Id. at 34:17-23. After the store closed, but before employees  
24 were released to go home, Mr. Orme left Linens to go to the  
25 restroom, then stopped in the doorway of the break room to watch a  
26 basketball game. Id. at 34:20-35:1. Mr. Orme has testified that he

1 was there for approximately one minute. Id. at 44:18-24. Ms.  
2 Jacobson saw him and told him to get back to his department; Mr.  
3 Orme has testified that she was yelling at him, and he ignored her.  
4 Id. at 35:2-6. As Mr. Orme was walking back toward Linens, he heard  
5 her say, "You people don't know how to do your job," and either  
6 "You don't know how to do your fucking job," or "You need to do  
7 your fucking job." Id. at 35:7-16. Mr. Orme testified that he was  
8 shocked, id. at 35:12, and asked Ms. Jacobson, "Did you verbally  
9 assault me?" and she agreed she did while laughing. Id. at 35:17-  
10 20.

11 Mr. Orme returned to Linens, but testified that he was  
12 "enraged." Id. at 35:21-24, 40:22-25. He then went to see Mr.  
13 Cornette, as Mr. Kidd was not working that night. Id. at 35:22-  
14 36:01. Mr. Orme told Mr. Cornette that he had been verbally  
15 assaulted by Ms. Jacobson, that Ms. Jacobson had used a "racial  
16 slur," and that he needed to go home to "avoid further  
17 altercations." Id. at 36:7-9. Ms. Jacobson, who had come in right  
18 behind Mr. Orme, responded that Linens was not clean and that Mr.  
19 Orme could not leave. Id. at 36:6-12. Mr. Orme repeated that he  
20 wanted to leave because of Ms. Jacobson's statement. Id. at 36:13-  
21 15. Soon afterward, Mr. Orme was allowed to leave. Id. at 36:22-24.

22 At the time Ms. Jacobson encountered Mr. Orme at the break  
23 room, he was not on an official break, but Burlington allows  
24 restroom breaks outside of official breaks. Rosenthal Declaration,  
25 Exhibit JK, deposition of James Kidd (Kidd dep.) 113:18-21. Mr.  
26 Orme testified that he did not tell anyone in his department when  
27

1 he went to the restroom because there was no one to tell. Orme dep.  
2 45:11-13.

3 The next day, Mr. Orme told Mr. Kidd he needed to speak to him  
4 about the April 14, 2006 incident with Ms. Jacobson. Orme dep.  
5 53:14-17, 22-24. Mr. Kidd met with Mr. Orme about noon. Id. at  
6 54:3-5. Mr. Orme related his version of the events and asked for  
7 and received the telephone number for Mr. Bennett so that he could  
8 discuss the April 14 incident with Mr. Bennett. Id. at 54:6-14. Mr.  
9 Kidd told Mr. Orme that Burlington would investigate. Id. at 54:6-  
10 14; 55:11-15; 55:22-24. At his next break, Mr. Orme called Mr.  
11 Bennett and left a message. Id. at 54:15-22.

12 Mr. Kidd also telephoned Mr. Bennett, to tell him about the  
13 April 14 incident. Declaration of Dana Bennett ¶ 5. Mr. Bennett  
14 states in his declaration, dated June 5, 2008, that "[t]hrough Mr.  
15 Kidd, [Burlington] began an investigation and interviewed and/or  
16 received statements from five employees, including potential  
17 witnesses Victoria Vanderev, Koang Chuol, Cecil Cornette, Paul  
18 Higley, and Dorothy Jacobson." Id. at ¶ 6.

19 Mr. Kidd testified that when Mr. Orme first made his  
20 complaint, "[r]acism didn't really pop its head up. It was  
21 primarily the disrespectful tone of Dorothy's comment to him and  
22 her cursing." Kidd dep. 77:21-25. But Mr. Bennett testified at his  
23 deposition that the issue of whether the "you people" reference was  
24 racially discriminatory was discussed between himself and Mr. Kidd  
25 on or before April 20. Bennett dep. 106:15-19.

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28 FINDINGS AND RECOMMENDATION Page 4

1 According to Mr. Kidd, there was "a lot of investigating from  
2 his complaint and then from Dorothy's. And it was a time-consuming  
3 ordeal. It was on a weekend, and I needed to consummate as much of  
4 the facts as I could from those that were involved." Kidd dep.  
5 81:21-82:1.<sup>1</sup>

6 While being interviewed by Mr. Kidd in connection with Mr.  
7 Orme's complaint against her, Ms. Jacobson complained about Mr.  
8 Orme's arguing with her about whether Linens was recovered at the  
9 time she made her "you people" comment. Kidd dep. 54:1-6. In  
10 response to Ms. Jacobson's complaint about Mr. Orme, Mr. Kidd  
11 prepared a reprimand, designated a "final warning" for Mr. Orme.

12 On April 20, 2006, Mr. Bennett went to the store, and he and  
13 Mr. Kidd had a meeting with Mr. Orme. Mr. Kidd testified that  
14 before meeting with Mr. Orme, he and Mr. Bennett went over the  
15 documents he had compiled, "what I had investigated and found out  
16 to that point. And I'm not sure exactly everything that I had at  
17 that point." Kidd dep. 162:23-163:2.<sup>2</sup> Mr. Bennett and Mr. Kidd  
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19 <sup>1</sup> Mr. Kidd's investigation of Mr. Orme's complaint consisted  
20 of interviewing Dorothy Jacobson and two other people, Victoria  
21 Vanderev and Koang Chuol. Koang said he heard nothing, but some  
22 yelling, but did not stop to listen to what was said; Vanderev  
23 said she heard part of the conversation and only remembered that  
24 Ms. Jacobson was telling Mr. Orme to do his work and that Mr.  
25 Orme was talking about her disrespecting him. Paul Higley was not  
26 present that night; his input was limited to the comment that  
27 Linens was not clean when he got there the next day. There is no  
28 indication that Cecil Cornette was interviewed or had any  
knowledge of what had happened except for what Mr. Orme told him.  
No other witnesses are named in the record. See Kidd Declaration,  
Exhibit 1.

26 <sup>2</sup> As discussed below, Mr. Bennett testified that he never  
27 saw any documentation before the April 20, 2006 meeting.

1 interviewed Mr. Orme to get his version of the April 14, 2006  
2 incident. Bennett Declaration ¶ 7. Mr. Bennett says that after

3 listening to plaintiff's version of the incident, I  
4 indicated to Mr. Orme that statements taken from Ms.  
5 Jacobson and other employees witnessing the incident did  
6 not corroborate his version of events, but instead  
7 supported Ms. Jacobson's version that Mr. Orme's  
department was not clean, no racially motivated comment  
was made, Mr. Orme was caught on an unauthorized break  
watching television at closing, and Mr. Orme was verbally  
abusive/insubordinate to Ms. Jacobson when she confronted  
him.

8 Id. However, at his deposition, four months before the declaration,  
9 Mr. Bennett testified that he did not know whether he had any  
10 information that would indicate that Mr. Orme's complaint was not  
11 made in good faith, Bennett dep. 93:1-14, and that he did not know  
12 what the "conflicting story" was. Id. at 95:17-18. At his  
13 deposition, Mr. Bennett had no recollection of Ms. Jacobson's side  
14 of the story. Id. at 128:11-22. Despite the statement in his  
15 declaration that Burlington had obtained a statement from Paul  
16 Higley, Bennett testified at his deposition that he had never seen  
17 Mr. Higley's statement before his deposition and did not know who  
18 asked Mr. Higley to prepare it. Id. 129:2-6. At least on the basis  
19 of the record before the court, the only person who contradicted  
20 Mr. Orme's version of events was Ms. Jacobson.

21 Mr. Bennett's deposition testimony is internally inconsistent  
22 and disclaims much of Mr. Kidd's testimony. He testified that Mr.  
23 Kidd contacted him to say that Mr. Orme had come to him about an  
24 "incident on a closing shift," and that Mr. Orme was "very upset."  
25 Id. at 17:16-25. Then he testified that he did not remember what  
26 Mr. Kidd said when he contacted Mr. Bennett about the situation  
27

1 with Mr. Orme, or what he himself said to Mr. Kidd. Id. at 89:23-  
2 90:11. He testified that he did not, before the April 20 meeting,  
3 know what Mr. Orme's complaint was. Id. at 45:12-15; 46:15-16. He  
4 did not remember receiving the "final warning" to Mr. Orme that Mr.  
5 Kidd prepared before the April 20 meeting. Id. at 46:20-47:11. Mr.  
6 Bennett testified that prior to the meeting on April 20, he was not  
7 aware that Ms. Jacobson had complained about Mr. Orme. Id. at 47:7-  
8 10.

9 He did not remember what he told Mr. Orme on April 20, 2006,  
10 or what Mr. Orme said. Id. at 91:2-21. He had no recollection of  
11 ever asking Mr. Orme for documentation of his complaint or of  
12 "asking him for anything." Id. at 47:20-22. He did not know what  
13 kind of action Burlington would take to deter discrimination. Id.  
14 at 61:17-64:7.

15 Mr. Bennett recalled that Mr. Kidd had told him Mr. Orme  
16 complained to him about Ms. Jacobson's use of the words, "you  
17 people," id. at 89:13-18,<sup>3</sup> and the possibility of race  
18 discrimination, id. at 106:15-19, but said he did not remember  
19 whether Mr. Orme said, at the April 20 meeting, that Ms. Jacobson  
20 made a racial comment by referring to "you people." Id. 90:2-6. In  
21 fact, he did not recall whether the reference to "you people" was  
22 even discussed at the April 20 meeting, id. at 91:14-22, although  
23 he did testify that he would have been "concerned" if Mr. Orme had  
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25 <sup>3</sup> Although Kidd testified that as of April 19, he did not  
26 "seriously think, and there was nothing related to me, that it  
27 was a quote racist--racism situation." Kidd dep. 101:13-20. See  
also 175:20-22.

1 brought it up. Id. at 93:17-94:7. Later in his deposition, Mr.  
2 Bennett remembered that at the April 20 meeting, Mr. Orme brought  
3 up the question of Ms. Jacobson referring to "you people." Id. at  
4 105:15-17.

5 Mr. Bennett testified that he had "no idea" whether there was  
6 any evidence to suggest that Mr. Orme's complaint was not made in  
7 good faith. Id. at 92:17-25; 93:1-14. Mr. Bennett repeated that he  
8 had "no idea" whether Mr. Orme truly believed Ms. Jacobson had been  
9 disrespectful toward him with a racial comment when she said "you  
10 people." Id. at 93:25-94:13. Mr. Bennett did not recall how he  
11 responded to Mr. Orme at the meeting. Id. at 90:10-11; 94:14-95:3.  
12 He did not remember telling Mr. Orme that his conversations with  
13 Ms. Jacobson would be of no concern to Mr. Orme, although he  
14 thought it sounded reasonable. Id. 94:14-23. He did not recall  
15 reviewing any documents before the April 20 meeting. Id. at 94:24-  
16 95:18.

17 Mr. Bennett initially testified that he had no specific  
18 recollection of whether Mr. Orme did or did not say that he could  
19 not work with someone who had been disrespectful to him. Id. at  
20 89:5-12. He did not recall touching on the issue of whether Mr.  
21 Orme would or would not take leadership or direction from Ms.  
22 Jacobson at the April 20 meeting. Id. at 97:20-98:5. However, later  
23 in the deposition, he recalled that Mr. Orme told him he was not  
24 going to follow Ms. Jacobson's direction, and that Mr. Bennett  
25 said, "Well, I guess you leave me no other option, and I guess  
26 you're giving me your resignation," to which Mr. Orme responded



1 "Yes, I guess I am." Id. at 99:15-100:2.

2 Mr. Bennett subsequently changed his testimony to say that Mr.  
3 Orme told him, "I can't work for Dorothy any longer," and that Mr.  
4 Bennett responded, "Well... you're not leaving us many options. So,  
5 if you can't follow direction, then you're going to have to--you  
6 know, you're going to have to be able to have that separation and  
7 have that discussion and follow the leadership of Dorothy as well  
8 as the other managers in the store." Id. at 110:19-111:5.<sup>4</sup> Mr.  
9 Bennett then clarified that he didn't know if he used the words "no  
10 option." Id. at 100:3-5. Then he repeated that he had no  
11 recollection of Mr. Orme saying he could not work with someone like  
12 Dorothy. Id. 100:16-18. He did not recall who first used the word  
13 "resignation." Id. at 98:6-10. However, he recalled Mr. Orme  
14 saying, "Yeah, I guess I am," though these words do not appear in  
15 Mr. Kidd's summary. Id. at 98:15-24.

16 Mr. Bennett subsequently revised his recollection further,  
17 remembering that Mr. Orme said, "I'm not going to listen to  
18 Dorothy." Id. at 112:14-16. See also id. at 110:19-111:5.

19 Despite saying initially that he did not remember anything  
20 about the April 20 meeting, later in the deposition Mr. Bennett  
21 recalled that he told Mr. Orme he was at the April 20 meeting to  
22 listen to all sides of the stories, that he wanted to get to the  
23 bottom of it, and find out what really happened so that Burlington  
24 could be fair in its decision, and that he was going to talk with  
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26 <sup>4</sup>Although Mr. Bennett then confirmed that Ms. Jacobson was  
27 not a supervisor. Id. at 111:25-112:1.

1 Mr. Orme, with Dorothy Jacobson, and with any other witnesses. Id.  
2 at 105:7-13, 105:25-106:6, 107:1-6, 109:8-14. He then remembered  
3 that Mr. Orme started "attacking Dorothy" and not listening to him  
4 "as far as what my take on" the use of the words "you people" was.  
5 Id. at 109:15-23. Mr. Bennett did not recall reviewing any  
6 investigatory documents before the April 20 meeting. Id. at 94:24-  
7 95:6, 109:1-3. Despite the promise to get to the bottom of the  
8 situation, he did not talk to or meet with anyone except Mr. Kidd  
9 and Mr. Orme on April 20, 2006. Id. at 105:1-7. Mr. Bennett then  
10 testified that he did not know whether he told Mr. Orme action  
11 would be taken if his discrimination allegations were true. Id.  
12 110:3-8. He never reviewed Mr. Kidd's documentation of the April  
13 20, 2006 meeting for accuracy; he read it for the first time the  
14 morning of the deposition. Id. at 110:9-13.

15 According to Mr. Orme, when he came into Mr. Bennett's office,  
16 Mr. Bennett asked him what happened. Orme dep. 61:16-17. Mr. Orme  
17 told Mr. Bennett that Ms. Jacobson "verbally and racially assaulted  
18 me," saying "you people don't know how to do your job" and that he  
19 needed to "do his fucking job." Id. at 61:10-12, 61:21-24.  
20 According to Mr. Orme's testimony, Mr. Bennett's response was that  
21 Burlington had obtained a statement from Ms. Jacobson and someone  
22 else "saying it was the other way around." Id. at 62:13-17. Mr.  
23 Orme responded that it was "fine" if they were taking Ms.  
24 Jacobson's side over his, but that she "racially assaulted me and  
25 I was wondering if anything was going to happen to Dorothy." Id. at  
26 62:18-21. Mr. Orme testified that Mr. Bennett told him they were

1 "doing their best," but that "pretty much nothing would happen to  
 2 Dorothy," id. at 62:22-24, because Burlington was not going to  
 3 discipline Ms. Jacobson. Id. at 64:13-14, 65:10-18. Mr. Orme's  
 4 understanding was that Mr. Bennett did not believe his version of  
 5 events. Id. at 63:21-14, 64:2-4.

6 Mr. Orme denies refusing to work with or take direction from  
 7 Ms. Jacobson, testifying that he said only that he felt  
 8 uncomfortable working with someone who racially assaulted him. Id.  
 9 at 64:18-25, 65:1-6.

10 Mr. Orme testified that Mr. Bennett told him, "We're going to  
 11 have to let you go." Id. at 68:5-6. According to Mr. Orme, Mr.  
 12 Bennett did not say that if Mr. Orme refused to work with Ms.  
 13 Jacobson, Burlington would accept his resignation. Id. at 68:7-11.

14 Mr. Kidd testified that he received Ms. Jacobson's version of  
 15 events on April 15, 2006, and that he decided to reprimand Mr. Orme  
 16 when he "got all of the documentation compiled." Kidd dep. 78:18-  
 17 79:2.

18 Mr. Kidd testified at his deposition that he took notes of his  
 19 interviews, but did not keep the notes, instead transferring what  
 20 was on his notes to the reprimands he wrote out, Exhibits 7 and 8  
 21 of the Rosenthal Declaration. Kidd dep. 79:21-81:1.<sup>5</sup> However, with

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22 <sup>5</sup> The testimony is:

23 Q: So at what point had you decided to discipline Mr. Orme  
 24 for what occurred on the 14<sup>th</sup>?

25 A: Once I had all the information compiled from my--my  
 notes.

26 Q: And--

27 A: And I transferred them onto the documentation from  
 Dorothy's complaint.

28 Q: And we're talking about--when you say your notes, we're

its reply materials, Burlington filed some handwritten notes along with a declaration from Mr. Kidd, in which Mr. Kidd states that attached to his declaration are "true and accurate copies of witness statements and notes from witness interviews that I conducted in reference to the April 14, 2006 altercation." Kidd Declaration ¶ 6. Mr. Kidd does not say whether the notes and statements were created at the time of the investigation or for purposes of this litigation.

When Mr. Orme came into the meeting with him and Dana Bennett, Mr. Kidd had a disciplinary document prepared. Id. at 79:6-20, Rosenthal Declaration, Exhibit 8. The document states that it is a "final written warning" for "insubordination." Under the heading "Nature of Violation," Mr. Kidd wrote as follows:

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talking about documents other than these documents (i.e., Exhibits 7 and 8)?

A: All of these notes (indicating), okay, that I took, the documentation, were summarized primarily on this form right here (indicating). That's what I usually do.

Q: (By Burlington's counsel, Mr. Belnavis) "This form" being Exhibit 8.

A: Yeah.

Q: And what I'm asking you, though, is if--these other documents, we don't have. You said these were scraps of paper that you threw out.

A: I told you that I probably had scraps of paper. I take my notes every day. I'm running a store.

Q: Right. I understand that.

A: Okay. And in between being interrupted numerous times, I do jot down notes. And I'm probably the only one that can read my notes. And then I will go ahead and reenter them from my notes--okay?

Q: Right. Right.

A: --on the document that everybody else--

Q: And we don't have those original notes?

A: No. No.

1 Friday evening 4/14 9:15 (approx. time) Dorothy Jacobson  
 2 Dept. Mgr. Sportswear was supervising recovery of the  
 3 store when she encountered Daniel in the Associates'  
 4 Lounge watching a Basketball game. When Dorothy informed  
 5 Daniel he needed to get back to his dept. & do his job -  
 6 He he argued w/ her- stating the department was clean.  
 7 When Dorothy pointed out the areas of his dept. needing  
 8 recovery- Daniel continued argueing w/ a member of  
 9 management showing complete disrespect towards Dorothy  
 10 and her position of authority. This type of disrespect  
 11 toward a member of the store Management Team is a blatant  
 12 act of insubordination & against all Company  
 13 Standards/Discipline and can not be allowed. Any further  
 14 violations of company/store policies & standards may lead  
 15 to additional Disciplinary Action up to and including  
 16 Immediate Discharge.

17 Exhibit 8.<sup>6</sup> This document was faxed to Mr. Bennett before the April  
 18 20 meeting with Mr. Orme, but was not given or shown to Mr. Orme.  
 19 Mr. Kidd testified that he faxed Exhibit 8, the reprimand, to Mr.  
 20 Bennett on April 19, 2006. Kidd dep. 97:12-98:19. Mr. Kidd  
 21 testified that had Mr. Orme not filed a complaint, he would not  
 22 have sent the reprimand to Mr. Bennett. Kidd dep. 98:22-99:4.

23 After the meeting on April 20, 2006, Mr. Kidd prepared an  
 24 "Employee Warning," for "Improper Personal Conduct," "Poor  
 25 Performance," and "Altercation/Fighting." Under the heading "Nature  
 26 of Violation," Mr. Kidd wrote:

27 today 4/20/06 dana bennett (district mgr) and myself  
 28 called daniel orme into the managers office at 3 pm to  
 discuss the incident of 4/14/06 involving daniel and dept  
 manager dorothy jacobson (sportswear). (documentation  
 attached) dana asked daniel to tell his side of the  
 situation of that evening. after daniel informed dana of  
 his side, dana was explaining what dorthy's and every  
 managers responsibility was for store recovery in  
 directing all associates in their respective areas; and  
 dana was interrupted consistantly by daniel. when dana

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29 <sup>6</sup> Spelling, punctuation and abbreviations are as they appear  
 30 in original document.

1 informed daniel from the beginning of the conversation  
2 that he was here to listen to his side, daniel was  
3 persistant in stateing that he could not work with  
4 someone that he does not respect especially one that had  
5 disrespected him, suggesting dorothy made a "racial"  
6 comment by stating "you people"! during their incident!  
7 dana continued to try and explain that daniel's  
8 responsibility was to not argue with dorothy and disagree  
9 with her, but to do what he was told and then take it to  
10 store management. daniel continued to interrupt dana in  
11 a disrespectful manner stating "your here talking to me  
12 disrespecting her [sic]; what have you said to dorthy of  
13 her disrespecting me with a "racial" comment when she  
14 said you people? dana answered by stating his  
15 conversations with dorthy would be of no concern to him<sup>7</sup>  
16 that it would be confidential like this one. daniel  
17 stated once again that he would not work with someone  
18 like dorothy and at that point dana stated there were  
19 conflicting stories of the incident in the documentation  
20 he has read; that dorothy is part of this management in  
21 this store and she will continue being so and if his  
22 predetermined notion was not to listen then dana would  
23 accept daniel's resignation immediately. daniel stated he  
24 was getting his attorney and requested dana write his  
25 full name and dorothy's, at which time dana responded,  
26 "no" that will not happen, and if that is your decision  
27 i will accept your resignation and your attorney can  
28 contact our attorney. daniel said okay, clocked out and  
dana informed him that we would put in his hours this  
week and his last paycheck should be here monday.

16 Id. at Exhibit 7. Neither Exhibit 7 nor Exhibit 8 was given to Mr.  
17 Orme. Kidd dep. 126:1-14.

18 On April 26, 2006, Mr. Kidd prepared another document which  
19 notified Burlington's corporate office of Mr. Orme's termination.  
20 Rosenthal Declaration, Exhibit 10; Kidd dep. 127:13-3-128:3. The  
21 document states that Mr. Orme was terminated on April 26, 2006, for  
22 misconduct. Burlington submitted an Employer's Statement to the  
23 State of Washington which advised that Mr. Orme last worked on  
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25  
26 <sup>7</sup> I.e., Mr. Orme. Kidd dep. 182:21-183:2. As of April 20,  
27 2006, Mr. Bennett had had no conversations with Ms. Jacobson.  
28 Kidd dep. 183:3-5.

1 April 20, 2006, and was separated on May 6, 2006, having been  
2 discharged for "verbal inappropriate conduct." Rosenthal  
3 Declaration, Exhibit 18, p. 1-2.

#### 4 **Standard**

5 A party is entitled to summary judgment if the "pleadings,  
6 depositions, answers to interrogatories, and admissions on file,  
7 together with affidavits, if any, show there is no genuine issue as  
8 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is  
9 not proper if material factual issues exist for trial. Warren v.  
10 City of Carlsbad, 58 F.3d 439, 441 (9<sup>th</sup> Cir. 1995). A genuine  
11 dispute arises "if the evidence is such that a reasonable jury  
12 could return a verdict for the nonmoving party." State of  
13 California v. Campbell, 319 F.3d 1161, 1166 (9<sup>th</sup> Cir. 2003). Where  
14 the record taken as a whole could not lead a rational trier of fact  
15 to find for the non-moving party, there is no genuine issue for  
16 trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.  
17 574, 587 (1986).

18 On a motion for summary judgment, the court must view the  
19 evidence in the light most favorable to the non-movant and must  
20 draw all reasonable inferences in the non-movant's favor. Clicks  
21 Billiards Inc. v. Sixshooters Inc., 251 F.3d 1252, 1257 (9<sup>th</sup> Cir.  
22 2001). The court may not make credibility determinations or weigh  
23 the evidence. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S.  
24 133, 150 (2000). Where different ultimate inferences may be drawn,  
25 summary judgment is inappropriate. Sankovich v. Ins. Co. of N. Am.,  
26 638 F.2d 136, 140 (9<sup>th</sup> Cir. 1981).

## Discussion

### A. Retaliation

Section 704(a) of Title VII provides that

it shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter.

42 U.S.C. § 2000e-3(a). Among other things, § 704(a) prohibits employers from retaliating against employees who oppose discriminatory employment practices.

#### 1. Elements of prima facie case

To establish a prima facie case of retaliation, the employee must show that 1) he has engaged in statutorily protected expression; 2) he has suffered an adverse employment action; and 3) there is a causal link between the protected expression and the adverse action. EEOC v. Dinuba Medical Clinic, 222 F.3d 580, 586 (9<sup>th</sup> Cir. 2000). The definition of "adverse employment action" in the context of a retaliation claim is different, and broader, than in the context of a disparate treatment claim. Burlington N. & Santa Fe Rwy. Co. v. White, 548 U.S. 53 (2006). For purposes of a retaliation claim, the term "adverse employment action" is not limited to actions that affect the terms and conditions of employment; rather, it is an action that might dissuade a reasonable worker from engaging in protected activity. Id. See also Ray v. Henderson, 217 F.3d 1234, 1243 (9<sup>th</sup> Cir. 2000).

In some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity, see, e.g., Villiarimo v. Aloha Island Air,



1 Inc., 281 F.3d 1054, 1065 (9<sup>th</sup> Cir. 2002) and Passantino v. Johnson  
2 & Johnson Consumer Prods., Inc., 212 F.3d 493, 507 (9<sup>th</sup> Cir. 2000),  
3 particularly when the adverse action occurs "fairly soon after the  
4 employee's protected expression." Villiarimo, 281 F.3d at 1065. See  
5 also Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273  
6 (2001) (cases that accept mere temporal proximity between an  
7 employer's knowledge of protected activity and an adverse  
8 employment action as sufficient evidence uniformly hold that the  
9 temporal proximity must be very close).

10 Burlington asserts that Mr. Orme has failed to establish the  
11 elements of protected activity, adverse employment action or causal  
12 link.

13 a. Protected activity

14 Burlington asserts that where the conduct complained of could  
15 not reasonably be considered to have violated Title VII, a  
16 complaint about it does not constitute protected activity for  
17 purposes of making a retaliation claim, citing a case from the  
18 Eastern District of Washington, Daly v. Cazier Enterprises, Inc.,  
19 2006 U.S. Dist. LEXIS 80847 (E.D. Wash. 2006) (attached to  
20 Supplemental Nelson Declaration as Exhibit 12).

21 Daly was a female college student who worked at a family run  
22 Subway sandwich franchise. Her employer, Cazier, became concerned  
23 about customer complaints from the store where Daly usually worked,  
24 and brought in a new manager. The new manager, Caserez, a woman,  
25 held a store wide employee meeting emphasizing the importance of  
26 customer service and warned employees that they could lose their

1 jobs if the situation did not improve.

2       The next day, Noe Valencia, a Mexican-American supervisor who  
3 normally worked at a different location, was on duty at the store  
4 where Daly worked. At one point, Daly was in the back of the store  
5 and asked Mr. Valencia, "Do you got it [sic] or should I get it?"  
6 with regard to a customer. Valencia later told Daly that the way  
7 she asked the question, in front of the customer, would make other  
8 Mexicans think she did not like her job and was lazy. He advised  
9 her to ask her coworkers, "Would you like help?" Soon after this  
10 conversation, Daly went to the back of the store to get a bag of  
11 mustard. She remarked that the bag she was carrying "feels just  
12 like a baby." In response, Valencia asked Daly whether she had any  
13 children and whether she was married. She responded that she did  
14 not have time for children or marriage as she was in college.  
15 Valencia said he was married at 20, and that he knew other people  
16 who had children at that age. At some point during the shift Daly  
17 told Valencia she was uncomfortable with the questioning. Later  
18 that evening, Valencia had a conversation with another Hispanic  
19 supervisor, Guadalupe Saenz. Daly, who understands Spanish,  
20 overheard Valencia telling Saenz about the conversation he had with  
21 Daly about the interaction with the customer, and saying Daly was  
22 very lazy.

23       Daly wrote a letter to Cazier complaining about her  
24 interactions with Valencia and the conversation between Valencia  
25 and Saenz. Crazier investigated the incident and met with Daly.  
26 Daly indicated that her coworkers had been harassing her. To Daly,  
27

1 the meeting seemed like an interrogation and Caserez tested Daly's  
2 Spanish. Daly asked not to have to work with Valencia again.  
3 Subsequent to the complaint, Daly's work hours were decreased.  
4 About two weeks later, Daly was terminated. In Cazier's termination  
5 letter, he indicated that Daly's complaint was one factor in his  
6 decision to terminate her.

7 The court held that Daly could not assert a claim for  
8 retaliation under Title VII because Daly failed to show she had  
9 engaged in statutorily protected activity: her complaint, about a  
10 single incident, was not even arguably based on violation of the  
11 law or conduct that Daly reasonably believed was discriminatory.<sup>8</sup>

12 The Daly opinion relied on Clark County Sch. Dist. v. Breeden,  
13 532 U.S. 268 (2001) (per curiam). In Breeden, the Supreme Court held  
14 that a plaintiff was precluded from asserting a retaliation claim  
15 based on her internal complaints about an incident of alleged  
16 sexual harassment because no reasonable person could have believed  
17 that the incident violated Title VII.

18 In Breeden, plaintiff contended that her employer had taken  
19 adverse employment actions against her in response to protected  
20 activities. She alleged that a male supervisor met with plaintiff  
21 and another male employee to review the psychological evaluation  
22 reports of job applicants. The report for one of the applicants  
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24 <sup>8</sup> The court noted that establishing a retaliation claim  
25 under 42 U.S.C. § 1981 "may be more complicated" than a  
26 retaliation claim under Title VII because "there are no  
27 underlying standards on which to base the determination of  
whether the plaintiff engaged in protected activity." 2006 LEXIS  
80847 at \*14.

1 disclosed that the applicant had once commented to a co-worker, "I  
2 hear that making love to you is like making love to the Grand  
3 Canyon." At the meeting, plaintiff's supervisor read the comment  
4 aloud, looked at plaintiff and said, "I don't know what that  
5 means." The other male employee then said, "Well, I'll tell you  
6 later," and both men chuckled. Plaintiff complained about the  
7 episode. Her claim of retaliation asserted that she was punished  
8 for these complaints.

9       The Supreme Court applied the standard used by the Ninth  
10 Circuit below, without ruling on the standard itself, that Title  
11 VII protects employee opposition "not just to practices that are  
12 actually made ... unlawful" by Title VII, but also to practices  
13 that the employee could reasonably believe were unlawful. See Trent  
14 v. Valley Electric Ass'n Inc., 41 F.3d 524, 526 (9<sup>th</sup> Cir. 1994). The  
15 Court concluded that no reasonable person could have believed that  
16 the single incident complained of by the plaintiff violated Title  
17 VII, because the "ordinary terms and conditions of [plaintiff's]  
18 job required her to review the sexually explicit statement in the  
19 course of screening job applicants," and her co-workers in the  
20 hiring process were subject to the same requirement. The Court  
21 noted that in the district court, plaintiff "conceded that it did  
22 not bother or upset her" to read the statement in the applicant's  
23 file. Breeden, 532 U.S. at 271. The Court held that the  
24 supervisor's comment, the co-worker's response, and the chuckling  
25 of both were at worst an "isolated incident" that could not  
26 remotely be considered as serious as the law required.

1 In Daly, the court applied Breeden to conclude that no  
2 reasonable person could believe that Valencia's single comment  
3 about Mexicans thinking Daly was lazy, and his discussion that same  
4 day with Saenz which Daly overheard, constituted violation of §  
5 1981 or created a hostile working environment.

6 Mr. Orme has submitted a case from the Southern District of  
7 New York, Watson v. E.S. Sutton, Inc., 2005 WL 217659 (S.D.N.Y.  
8 2005), but that case involves sexual harassment and the holding is  
9 specific to the facts.

10 I am unpersuaded that Breeden and Daly defeat Mr. Orme's  
11 claim. Ms. Jacobson's comment was ambiguous insofar as "you people"  
12 might or might not refer to race. It was not part of Mr. Orme's job  
13 duties to review racial comments, as it was plaintiff's job in  
14 Breeden to review sexually explicit statements, and unlike the  
15 plaintiff in Breeden, who said she was not bothered or upset by the  
16 comment, Mr. Orme testified that Ms. Jacobson's comment about "you  
17 people" enraged him. A comment made directly to the plaintiff, as  
18 here, is different in its impact from a comment appearing in a job  
19 applicant's file reacted to by coworkers without reference to  
20 plaintiff.

21 In contrast to the Daly case, Ms. Jacobson's comment about  
22 "you people" to Mr. Orme, an African-American, could reasonably be  
23 interpreted as a racial slur, unlike the comment of Valencia  
24 (apparently Mexican himself) about Mexicans thinking Daly, who is  
25 not a Mexican, was lazy. A reasonable juror could conclude that Mr.

26 ///

1 Orme reasonably believed that Ms. Jacobson's comment to him was  
2 racially discriminatory.

3 In its reply brief, Burlington makes an argument based on a  
4 different case, Green v. Shoreline Community College, 2006 U.S.  
5 Dist. LEXIS 92490 (E.D. Wash. 2006).

6 In that case, plaintiff Riccardo Green, who is Filipino,  
7 Mongolian, Jamaican, and Native American, taught tai chi courses at  
8 Shoreline. He alleged that he was told by a Shoreline employee,  
9 Nickerson, that he could not use computer equipment because the  
10 school was closing early. Green asked Nickerson whether she "has a  
11 problem with me" and "have you ever heard of racism?" Green alleged  
12 that on another occasion, he asked Nickerson for keys to a  
13 classroom, and that Nickerson's husband, who was present, told  
14 Green to say "please."

15 Green complained about the two incidents to Human Resources  
16 and may have made an EEOC complaint, although there was no evidence  
17 that the charge was processed or that Shoreline knew of it before  
18 the alleged adverse actions taken against Green by the college.

19 Shoreline continued to offer Green's courses through the  
20 summer quarter of 2005, but the courses for the winter, spring, and  
21 summer quarters of 2005 were cancelled for insufficient enrollment.  
22 The evidence showed that enrollment in the class dropped to 3 in  
23 winter term of 2005, zero in spring of 2005, and 2 in summer of  
24 2005, after previously ranging from 24 to 8. In May 2005, a  
25 Caucasian female was hired to teach a different type of tai chi  
26 course for the fall quarter of 2005.

1 The court held that Green's retaliation claim could not be  
2 maintained because his complaints were not protected activity. The  
3 court acknowledged that the two incidents with Nickerson might have  
4 been subjectively perceived as constituting harassment or  
5 discrimination based on race, but that under an objective standard,  
6 no reasonable person could believe that the two incidents  
7 constituted violations of Title VII by Shoreline.

8 As with Daly and Breeden, I conclude that the Green case is  
9 distinguishable from this case, and that Mr. Orme has satisfied the  
10 "protected activity" element of his prima facie case.

11 b. Adverse employment action and causation

12 Burlington contends that Mr. Orme suffered no adverse  
13 employment action, because he has not produced any evidence that he  
14 was reprimanded for complaining about Dorothy Jacobson's remark, or  
15 that he was terminated. Rather, Burlington argues, Mr. Orme was  
16 reprimanded for arguing with Ms. Jacobson, and he voluntarily  
17 resigned his employment after a "thorough investigation of his  
18 complaint showed that his allegations could not be substantiated."  
19 Defendant's Memorandum, p. 11.

20 According to Mr. Kidd's testimony, a written reprimand, based  
21 on Ms. Jacobson's response to Mr. Orme's complaints, had already  
22 been prepared and shown to Mr. Bennett before the April 20, 2006  
23 meeting--that is, before Burlington had interviewed Mr. Orme about  
24 his complaint. The parties do not dispute that the reprimand would  
25 not have been given if Mr. Orme had not complained about Ms.  
26 Jacobson.

1 Mr. Kidd did not say in his deposition who was interviewed in  
2 the course of his investigation or what was said. But as part of  
3 Burlington's reply materials, Mr. Kidd submitted a declaration  
4 stating that he interviewed Dorothy Jacobson and three witnesses.  
5 Declaration of Jim Kidd ¶ 3. The Declaration states that none of  
6 the witnesses he interviewed corroborated Mr. Orme's allegation  
7 that Ms. Jacobson had said anything referencing Mr. Orme's race.  
8 Id. at ¶ 4.

9 Mr. Kidd states in his declaration that Ms. Jacobson  
10 "complained to me about Mr. Orme's behavior the night of April 14,  
11 2006, providing a written statement that indicated that Mr. Orme  
12 argued with her when she told him that his department was not  
13 recovered and to get back to work." Id. at ¶ 5. The Jacobson  
14 statement itself is attached to Mr. Kidd's declaration as Exhibit  
15 1. In her statement, Ms. Jacobson denied using the "f word" to Mr.  
16 Orme and said that she told Mr. Orme he was not doing his job and  
17 to recover Linens properly. Ms. Jacobson asserted that Mr. Orme  
18 argued with her about whether his department was recovered. Id. In  
19 her statement, Ms. Jacobson does not admit or deny that she made a  
20 reference to "you people." Id. She states that Mr. Orme told Cecil  
21 Cornette he had a sick child and needed to leave, but her statement  
22 does not indicate whether she heard what Mr. Orme said to Mr.  
23 Cornette or whether she was told by Mr. Cornette. In any event,  
24 there is no evidence that Mr. Cornette was asked to corroborate  
25 this assertion by Ms. Jacobson.

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1 Mr. Kidd's notes reflect that Victoria, a Linens associate,  
2 told Mr. Kidd she heard Jacobson and Orme yelling at each other,  
3 with Jacobson saying, "You need to work," and Orme saying, "Don't  
4 disrespect me." Id. Mr. Kidd also wrote that Victoria had said,  
5 "Dorothy has a loud voice and should be more calm when talking to  
6 people." Id. Mr. Kidd's notes of the conversation with Victoria  
7 neither confirm nor disprove Mr. Orme's complaint about Ms.  
8 Jacobson's "you people" remark.

9 Mr. Kidd's notes reflect that someone named Koang in Receiving  
10 said he had only heard the yelling, but did not stop to listen to  
11 what was said. Id. Again, Mr. Kidd's notes neither confirm nor  
12 disprove Mr. Orme's complaint.

13 A written statement by Paul Higley is also attached to Mr.  
14 Kidd's declaration. The statement is dated April 15, 2006, the day  
15 after the incident with Jacobson. Id. Mr. Higley relates that Mr.  
16 Orme came in at 1:30 that day and started talking with Holly, a  
17 part time sales associate, about Ms. Jacobson. Mr. Higley said he  
18 interrupted the conversation "when it became apparent to me that  
19 Daniel was upset," and that Mr. Orme told him Ms. Jacobson had  
20 "jumped" him about not recovering the department, when the  
21 department was recovered and clean. Id. Mr. Higley said he stopped  
22 Mr. Orme and said, "I don't know what happened between you and  
23 Dorothy, but this department was not clean or [sic] was it  
24 recovered." Id. Mr. Higley took Mr. Orme to bath rugs and showed  
25 him the condition of the section as he had found it, but Mr. Orme  
26 was "firm in his statement that he did recover that section." Id.

1 Even if this new evidence from Burlington were admissible and  
2 timely, Mr. Kidd's notes do not support Burlington's contention  
3 that there is no genuine issue of material fact that the witnesses  
4 Mr. Kidd interviewed failed to corroborate Mr. Orme's complaint  
5 about a racist comment by Ms. Jacobson. The statements by Victoria  
6 and Koang neither confirm nor deny Mr. Orme's complaint. Mr.  
7 Higley's statement addresses only the question of whether Linens  
8 was recovered at the end of the day on April 14, 2006. Mr.  
9 Bennett's deposition testimony creates more questions than it  
10 resolves.

11 Mr. Kidd's testimony shows that Mr. Kidd had already prepared  
12 a "final warning" for Mr. Orme, based on "insubordination" toward  
13 Dorothy Jacobson before Mr. Kidd and Mr. Bennett had even heard Mr.  
14 Orme's side of the story. A jury could reasonably find that this  
15 "final warning" constituted retaliation for his complaint. As Mr.  
16 Orme points out, until Mr. Orme complained to Mr. Kidd about Ms.  
17 Jacobson, no reprimand or other discipline was pending against him.  
18 The reprimand that Mr. Kidd prepared and presented to Mr. Bennett  
19 was prepared after Mr. Orme complained about Ms. Jacobson, and was  
20 apparently prepared as a result of Mr. Orme's complaint--there is  
21 no indication in the record that the reprimand was the result of a  
22 complaint initiated by Ms. Jacobson before Mr. Kidd asked her about  
23 Mr. Orme's complaint.

24 A reasonable jury could also find that if Mr. Orme had not  
25 complained about Ms. Jacobson, he would not have been issued the  
26 reprimand and would not have been fired on April 20, 2006, during  
27

1 the meeting with Mr. Bennett that Mr. Orme himself had asked for.

2 I turn now to the question of whether Burlington had  
3 legitimate, non-discriminatory reasons to take the actions it did,  
4 and whether Mr. Orme has met his burden of showing pretext.

5 B. Legitimate explanation for employer's conduct

6 The employer can rebut the plaintiff's prima facie case by  
7 producing evidence of a legitimate, nondiscriminatory explanation  
8 for its actions. St. Mary's Honor Center v. Hicks, 509 U.S. 502,  
9 506-07 (1993) (if plaintiff establishes prima facie case, burden of  
10 production shifts to employer to articulate a nondiscriminatory  
11 reason for adverse employment action, causing the presumption  
12 created by the prima facie case to fall away.) The employer must  
13 produce evidence, not merely express an argument. Rodriguez v. GMC,  
14 904 F.2d 531, 533 (9<sup>th</sup> Cir. 1990).

15 There is essentially no evidentiary support for Burlington's  
16 contentions that 1) Mr. Orme's complaints were unsubstantiated by  
17 other witnesses in the course of an investigation conducted by Mr.  
18 Kidd, 2) the reprimand prepared by Mr. Kidd before the April 20  
19 meeting was prepared for reasons other than Mr. Orme's complaint  
20 about Ms. Jacobson's remark, and 3) Mr. Orme voluntarily resigned  
21 his position rather than being terminated.

22 C. Pretext

23 Mr. Orme can establish pretext in two ways:

- 24 (1) indirectly, by showing that the employer's proffered  
25 explanation is 'unworthy of credence' because it is  
26 internally inconsistent or otherwise not believable, or  
(2) directly, by showing that unlawful discrimination  
more likely motivated the employer.

1 Chuang, 225 F.3d at 1127. To survive summary judgment, Mr. Orme is  
2 not required to provide direct evidence of discriminatory intent as  
3 long as a reasonable factfinder could conclude, based on his prima  
4 facie case and the factfinder's disbelief of Burlington's reasons  
5 for discharge, that discrimination was the real reason for  
6 Burlington's actions. Nidds v. Schindler Elevator Corp., 113 F.3d  
7 912, 918 n. 2 (9<sup>th</sup> Cir. 1997).

8 Circumstantial evidence must be "specific" and "substantial"  
9 to create a triable issue of fact on whether the employer intended  
10 to discriminate. Godwin, 150 F.3d at 1222.<sup>9</sup> A plaintiff can make a  
11 case that an employer is biased by showing the employer's proffered  
12 explanation for the adverse action is "unworthy of credence."  
13 Coghlan v. American Seafoods Co. LLC, 413 F.3d 1090, 1095 (9<sup>th</sup> Cir.  
14 2005) (quoting Burdine, 450 U.S. at 256). As the Supreme Court  
15 explained in Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S.  
16 133, 147 (2000), "Proof that the defendant's explanation is  
17 unworthy of credence is simply one form of circumstantial evidence  
18 that is probative of intentional discrimination, and it may be  
19 quite persuasive." In deciding whether judgment as a matter of law  
20 is appropriate, the court looks at "the strength of the plaintiff's  
21 prima facie case, the probative value of the proof that the

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22  
23 <sup>9</sup> But see Cornwell v. Electra Cent. Credit Un., 439 F.3d  
24 1018, 1030-31 (9<sup>th</sup> Cir. 2006) (discussing whether post-Godwin  
25 cases may have overturned the Godwin requirement that a  
26 plaintiff's circumstantial evidence of pretext must be "specific  
27 and "substantial," but not finally deciding the issue because the  
evidence presented by the plaintiff was sufficient to create a  
genuine issue of fact regarding the defendant's motive for its  
actions under the Godwin specific and substantial standard in any  
event).

1 employer's explanation is false, and any other evidence that  
2 supports the employer's case." Reeves, 530 U.S. at 148-49.

3 The witness statements proffered by Mr. Kidd do not establish  
4 that Mr. Orme's complaint was unsubstantiated. Ms. Jacobson does  
5 not address the "you people" remark in her statement, neither  
6 confirming nor denying it. The other two witnesses Mr. Kidd  
7 interviewed, Victoria and Koang, denied hearing the entire  
8 conversation between Ms. Jacobson and Mr. Orme. It is undisputed  
9 that Mr. Higley was not in the store on April 14, 2006. There is no  
10 statement or other evidence from Mr. Cornette.

11 There is no dispute that the reprimand prepared by Mr. Kidd  
12 before the April 20, 2006 meeting would not have been prepared had  
13 Mr. Kidd not been investigating Mr. Orme's complaint. There is no  
14 evidence that Ms. Jacobson complained about Mr. Orme's  
15 argumentativeness or insubordination to her until she was  
16 interviewed by Mr. Kidd in connection with Mr. Orme's complaint  
17 about her.

18 Burlington's own documentation contains inconsistent  
19 statements about whether Mr. Orme resigned or was terminated for  
20 misconduct; the record contains two documents prepared by  
21 Burlington which state that Mr. Orme was terminated. Mr. Bennett's  
22 deposition testimony is contradictory and inconsistent on what was  
23 said to Mr. Orme and what Mr. Orme said. Mr. Bennett's testimony is  
24 also inconsistent with many of the statements in Mr. Kidd's  
25 documentation of the April 20 meeting.

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28 FINDINGS AND RECOMMENDATION Page 29

1 The evidence of pretext is sufficient to enable Mr. Orme to  
2 survive summary judgment.

3 **Recommendation**

4 I recommend that Burlington's motion for summary judgment  
5 (doc. # 47) be denied, because Mr. Orme has made out a prima facie  
6 case and has also submitted evidence sufficient to overcome  
7 Burlington's nondiscriminatory reasons to show pretext.

8 **Scheduling Order**

9 The above Findings and Recommendation will be referred to a  
10 United States District Judge for review. Objections, if any, are  
11 due October 14, 2008. If no objections are filed, review of the  
12 Findings and Recommendation will go under advisement on that date.  
13 If objections are filed, a response to the objections is due  
14 October 28, 2008 and the court's review of the Findings and  
15 Recommendation will go under advisement with the District Judge on  
16 that date.

17 Dated this 29<sup>th</sup> day of September, 2008.

18  
19 /s/ Dennis James Hubel  
20 Dennis James Hubel  
21 United States Magistrate Judge  
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